

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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: **In re: Special Counsel Investigation** : **Case No. 04-MS-296 (D.D.C.)**  
: : **(Chief Judge Thomas F. Hogan)**  
: **(Grand Jury Subpoena to Matthew Cooper)** :  
: **UNDER SEAL**  
..... **UNSEALED**

**FILED**

**AUG - 5 2004**

**GOVERNMENT'S MEMORANDUM  
REGARDING CONTEMPT PROCEEDING**

**NANCY MAYER HASTINGTON, CLERK  
U.S. DISTRICT COURT**

The UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, SPECIAL COUNSEL, respectfully submits this Memorandum Regarding Contempt Proceeding in connection with the Motion for Order to Show Cause Why Witness Should Not Be Held in Contempt of Court, which is scheduled for hearing on August 6, 2004.

**APPLICABLE LAW**

Proceedings related to recalcitrant witnesses who refuse to testify before the grand jury are governed by 28 U.S.C. § 1826. The statute provides in pertinent part:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of – (1) the court proceeding, or (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order of his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal

from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days form the filing of such appeal.

The “recalcitrant witness statute” has routinely been applied as the law governing contempt proceedings such as the matter now before the court. *See, e.g., In re Sealed Case (Three Cases)*, 829 F.2d 189 (D.D.C. 1987); *In re Sealed Case*, 794 F.2d 749 (D.D.C. 1986); *In re Matter of Catazaro*, 663 F. Supp. 1 (D.D.C. 1985).

### **DISCUSSION**

The Special Counsel has had the opportunity to discuss with Counsel for Matthew Cooper and TIME, Inc. the respective positions of the parties and submits this Memorandum to inform the court of the Special Counsel’s position on several matters.

(1) The Special Counsel submits that this court should be able to complete a full and fair hearing on the Order to Show Cause on August 6, 2004. Matthew Cooper and TIME, Inc. have received grand jury subpoenas. Both have moved to quash raising the same legal claims. Cooper’s motion to quash was fully briefed and argued. In this court’s order of July 20, Cooper’s motion to quash was denied. (For the same reasons, TIME, Inc.’s motion to quash should be denied.) Cooper and TIME, Inc. have indicated that they intend not to comply with the grand jury subpoenas. This court has issued an Order to Show Cause. The hearing on that order on August 6, 2004 will provide ample opportunity for Cooper and TIME, Inc. to state any just cause for the refusal to comply with the subpoenas. No further briefing or delays are necessary to resolve the matter in a manner fully consistent with due process and the relevant statutory provision. The fact is that the refusal of Cooper and TIME,

Inc. to comply is based on the position set forth in the motions to quash and previously rejected by this court. Cooper and TIME, Inc. are entitled to the opportunity to show just cause at the hearing on August 6, 2004, but the Special Counsel strongly believes that further delays are not warranted in this case. Absent the presentation of just cause for their refusal to comply with the subpoenas at the hearing on August 6, 2004, the Special Counsel will move that the court find Cooper and TIME, Inc. in contempt at the conclusion of that hearing. In the absence of a showing of just cause, a prompt finding of contempt will minimize the interference with the progress of the ongoing grand jury investigation and would be fully consistent with the procedures appropriate in contempt hearings, which are by law to be summary proceedings that are limited in scope and conducted without undue delay. *See In re Grand Jury Proceedings*, 613 F.2d 1171(D.D.C. 1979).

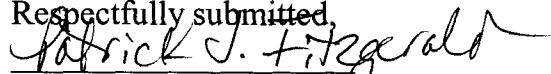
(2) If the court finds Matthew Cooper in contempt, the court should “summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information.” 28 U.S.C. § 1826(a). Counsel for Cooper and TIME, Inc. has suggested to the Special Counsel that a fine may be an appropriate alternative to confinement in this case. Counsel has provided the Special Counsel with citations to several cases where a court has imposed a fine that would be lifted upon purging a contempt. The only case counsel provided that involved a fine imposed for failing to comply with a grand jury subpoena was a case in which the witness had absconded from the United States, making confinement impractical. *In re Grand Jury Witness*, 835 F.2d 437 (2d Cir. 1987).

The other cases provided by counsel involved criminal trial subpoenas. *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993); *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988). Each of those cases involved small fines levied against corporate entities. Only in *Cutler* was a fine levied against individual reporters, and in that case the fine was symbolic (\$1.00 per day) and was stayed pending appeal. 6 F.3d at 70. The Special Counsel strongly believes that minor, symbolic fines would be completely inappropriate in a case of contemptuous refusal to provide evidence in a grand jury investigation after the court's careful consideration – and rejection – of a contemnor's legal claims. Setting aside the question of whether even substantial fines would be effective in gaining compliance with the subpoena in this case, which the Special Counsel doubts, the Special Counsel submits that, in the context of the ongoing grand jury investigation in this case, an order of confinement under section 1826(a) is the appropriate measure.

(3) Counsel for Matthew Cooper and TIME, Inc. has suggested that, if the court holds Cooper and TIME, Inc. in contempt, the civil contempt remedy imposed, whether it be confinement or fine, should be stayed by this court pending appeal. With respect to Matthew Cooper, the Special Counsel submits that Sections 1826(a) and (b) provide that if Cooper is found in contempt and confinement is deemed the appropriate measure, then the court should order his confinement and may be admitted to bail pending the appeal of the order of confinement. The standard in the statute for admitting a contemnor to bail is that the appeal

not be “frivolous or taken for delay.” 28 U.S.C. § 1826(b). This standard has been described by the D.C. Circuit as a “liberal standard” that was included in the statute after Congress considered and rejected a standard requiring a showing of a “substantial possibility of reversal.” *In re Sealed Case*, 794 F.2d at 750-51. In deciding on a position on the bail issue, the Special Counsel discussed the issue with opposing counsel. Without making any concession regarding the merits of the contempt action, counsel for Cooper and TIME, Inc. have agreed that in the event of an appeal, that they would file the notice of appeal by next Monday and briefing would be completed in approximately 21 days. Given that agreement, the Special Counsel’s position is that the court should admit Cooper to bail pending the appeal of the order of confinement.<sup>1</sup>

Respectfully submitted,



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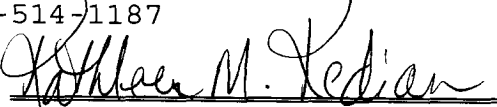
<sup>1</sup> The standard for bail adopted by Section 1826 stands in contrast to the standard usually applied to a request for a stay, which requires a showing of substantial likelihood of success on the merits on appeal. *United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C.C. 2003). The Special Counsel submits that Cooper cannot demonstrate a substantial likelihood of success on an appeal of this court’s alternative legal and factual rulings in denying the motions to quash.

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on this 5<sup>th</sup> day of August, 2004, I caused to be served by facsimile and Federal Express (overnight delivery) a true and correct copy of the foregoing filing entitled "GOVERNMENT'S MEMORANDUM REGARDING CONTEMPT PROCEEDING" as follows:

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